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CARRIERS' LIABILITY ON INTERSTATE SHIPMENTS OF GOODS.*

In choosing this subject for an article in a legal periodical one might be actuated not only by the importance of the subject itself, but by the fact that at the present time there is no correct guide in the text-books to the law applicable. One can today safely determine any question which may arise touching on this matter only by turning to recent Acts of Congress and to the decisions of the United States Supreme Court as reported in the last four volumes of the Supreme Court Reporter.

There is *no local* law on the subject, statutory or promulgated by decisions; the law of Maine is the law of Virginia, and the law of Virginia is that of California.

The reason for this situation is the exclusive authority which has in the last few years been asserted by the United States Supreme Court over this subject, and the basis of this declared authority was an amendment to the Interstate Commerce Act made by Congress in June, 1906. Its author, as its name denotes, was the lamented Senator Carmack of Tennessee.

It may help us in understanding the present law to briefly review what were the doctrines generally obtaining in the States relative to this subject, before Congress exercised its constitutional prerogative and took control. And, in this review, two questions present themselves, first the liability of the first carrier for losses on connecting lines, and, second, the right of a carrier to limit its common-law liability, even on its own line, by contract.

As to the first proposition, that of the liability of the initial carrier for losses on connecting lines, we all remember the different views which were taken.

*This article, somewhat condensed, was a paper read by the writer before the Hillsborough County, Florida, Bar Association. This explains the failure to cite cases for some of the more elementary propositions.

At common law no carrier was bound to accept goods destined for a point beyond the terminus of its own line. It was universally held that any liability beyond its terminus must be based on contract, express or implied. The point around which the conflict raged was: What constituted such an *implied* contract?

A few of the American courts followed the rule declared in England in Muschamp *v.* Lancaster & P. R. Co., decided in 1841. By this rule a contract was implied from acceptance for through carriage. The presumption was wholly in favor of the shipper, and it took a specific contract negativing liability to absolve the carrier. The great majority of our courts, however, adopted what came to be known as the "American Rule." By this rule no contract was implied from a mere acceptance for through carriage. In order for the carrier to be liable he had expressly to assume liability by contract.[1] Great conflict was apparent in the American decisions as to what would constitute an express contract for through carriage.

It is to be noted, however, that both of these so-called "Rules" were mere presumptions, which obtained only in the absence of express contract, and that under either rule it was everywhere held permissible for the first carrier to exclude all liability for losses occurring on connecting lines by an express contract. A stipulation in a bill of lading, which was accepted by the shipper, was held to be a valid express contract, and the result of this power to contract was, as all of us know, that it became the uniform practice for carriers to insert in their bills of lading stipulations to the effect that they were not to be held liable beyond the termini of their own lines. Independent of statutes to the contrary, these were always upheld.

The result was that, however meritorious his claim might be, a shipper could never be sure of getting judgment in a case where he did not know on which line the loss occurred. On a damaged shipment from Richmond to San Francisco he might pursue successive remedies against the carriers clear across the continent, and not find the one which actually caused the damage until he arrived on the Pacific coast. This condition of affairs

1. Virginia followed this rule. McConnell *v.* N. & W. R. Co., 86 Va. 248, 9 S. E. 1006.

was intolerable to the shipper, especially the small one, and in many States the legislatures enacted statutes seeking to hold the initial carrier liable in such cases, and forbidding contracts against such liability. Such statutes, when not oppressively drawn, were generally sustained as valid exercises of the power of the States, Congress not yet having assumed that control over the subject which the Constitution authorized.[2] Such enactments were generally attacked by the carriers as unauthorized interferences with interstate commerce, it being argued that this question as to interstate shipments belonged exclusively to Congress under the Commerce Clause of the Federal Constitution. Where a shipment from a State whose law thus favored the shipper was made to a State the policy of which on this question was divergent, there constantly arose an embarrassing question of conflict of laws. The body of law which grew up around this point alone, sufficiently shows how confusing the situation was for the shipper. The general rule was stated to be that the validity and effect of the contract was to be determined by the law of the *place where made* unless the contrary intention *plainly* appeared. Thus in a South Carolina case,[3] where a shipment of horses and mules was made from Virginia to a point in South Carolina, the law of Virginia, where the contract of shipment was made, was held to govern the carrier's liability for negligence, and under the Virginia law a contract *limiting* liability being invalid, such contract was held to be void by the South Carolina court in an action in that State. But there were a number of courts which refused to abide by his rule, and would enforce no contract which was considered opposed to the *public policy* of the State of the forum as shown by its statutes. Thus it was held in a Georgia case that a New York contract limiting liability, though valid in New York, would not be enforced in Georgia, because contrary to the public policy of the latter State.[4] The Virginia Court also adopted this view in toto.[5]

This being the condition of affairs, the carriers, who had ha-

2. Such a statute is § 1294c (24), Virginia Code.

3. Elliott *v.* A. C. L. R. Co. (S. C.), 75 S. E. 886.

4. Adams Ex. Co. *v.* C. J. DuBose Co. (Ga), 75 S. E. 601; So. Ex. Co. *v.* Hanaw (Ga.), 67 S. E. 994.

5. Adams Ex. Co. *v.* Green; 112 Va. 527, 72 S. E. 102.

bitually invoked the unexercised power of Congress to defeat remedial State legislation, at last got their answer. Congress *did* act, and, by an amendment to the Interstate Commerce Act, dated June 29, 1906, commonly known as "The Carmack Amendment," provided:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder therefor for any loss, damage or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

By a further provision a remedy over was given to the first carrier against the carrier actually in fault.

Surely this seemed an enactment wholly for the benefit of the shipper, the sole object of which was to make the first carrier liable to him, and to prevent the theretofore existing embarrassing uncertainty as to whom he should sue. It was hailed with delight by shippers and was held constitutional by the Supreme Court in the cases of A. C. L. R. Co. *v.* Riverside Mills, and N. & W. R. Co. *v.* Dixie Tobacco Co.[6]

The question immediately arose as to whether it made the first carrier an *insurer* of the goods throughout the route to destination, or whether it simply made such carrier liable for *negligence* of itself or succeeding carriers. This point was pressed on the court in the case of Galveston, etc., R. Co. *v.* Wallace,[7] but the court found it unnecessary to decide the question. But in the subsequent case of Adams Ex. Co. *v.* Croninger,[8] it was held that the Carmack amendment did not make the initial carrier an *insurer* of the goods throughout transpor-

6. 219 U. S. 186, 31 S. C. R. 164; 228 U. S. 593, 33 S. C. R. 609.
7. 223 U. S. 481, 32 S. C. 205.
8. 226 U. S. 491, 33 S. C. R. 148, 47 L. R. A. (N. S.) 257.

tation, but only made it liable for the *negligence* of itself or of a connecting carrier.

I am not aware that the question of whether, independent of contract, an initial carrier on an interstate shipment was still left an insurer *on its own line,* has as yet been determined by the Supreme Court. It is true that the court said in the Croninger Case that the amendment itself did not *make* the carrier liable for anything save *negligence* even on its own line. But there is a saving clause in the amendment to the effect that the shipper shall not be deprived of "any remedy or right of action which he has under existing law." And, even under the construction given to this proviso in the Croninger Case, that it referred to existing *Federal* law and not State law, it would seem that the common law liability, independent of contract, would still obtain as to the first carrier's own line. The *Federal* law, the general rule as enforced in the Federal courts, recognized the common-law liability, and, even though the Carmack amendment itself did not *impose* it (which was not necessary), there is no reason to say that it was *taken away.* Moreover, such a result would surely be strange in a remedial statute which was passed for the benefit of the shipper.

It has been held by the Georgia Court of Appeals, in decision which seems plainly correct,[9] that there is nothing in the Carmack amendment prohibiting an action against a connecting or delivering carrier, and when the delivering carrier is sued the common law presumptions as to his liability obtain.

From the language of the Carmack amendment it did not seem altogether clear as to whether it would apply to *baggage.* If it did not, then the old rule as to liability as between connecting carriers, and as to the validity of contracts limiting the amount of recovery, would have applied with all the confusion incident thereto. The South Dakota Court [10] held, without any discussion or assigning any reasons, that the amendment *did* apply and the first carrier was held liable for a loss on a connecting line. But in Hooker *v.* R. Co.[11] the Supreme Court of Massachusetts,

9. A. C. L. R. Co. *v.* Thomasville Live Stock Co. (Ga.), 78 S. E. 1019.

10. House *v.* R. Co. (So. Dak.), 138 N. W. 809.

11. 95 N. E. 945.

also without discussion, seemed to assume that the amendment did not apply to baggage. The question has been settled and the amendment held to apply to baggage by the Supreme Court in Boston & Maine R. Co. *v.* Hooker [12] (decided April 6, 1914).

On this phase of the question, the *direct* effect of the Carmack amendment, it remains only to say that it has been held not to change the burden of proof as it theretofore existed.

The plaintiff need only show delivery in good condition to the first carrier, acceptance by it, and that the goods were never delivered to the consignee, or were delivered in a damaged condition. When the plaintiff shows this, it was *formerly* sufficient for the carrier, when there was no express contract for through carriage, to show a delivery of the goods in good condition to the next succeeding carrier. This absolved the first carrier from all liability. It was not responsible for injuries occurring on connecting roads. Of course, if it could not show such a delivery, that is to say, if the loss or injury actually occurred on its line, then it would have to prove that the loss or injury occurred from one of the five excepted common-law causes; or, if it had a contract exempting itself from liability for accidental losses not due to its negligence (such as fire), that the loss or injury was due to such a cause.[13]

Where, however, the shipment was over connecting lines from a point in one State to a point in another State, the Carmack amendment applied, and the first carrier would be liable unless it showed, not only that the loss or injury did not occur through its own negligence, but also that such loss or injury did not occur through the negligence of any carrier on the route to destination.[14] It would certainly need to have shown this much, and, if the writer's idea be correct, that under the original Carmack amendment the carrier was still, in the absence of contract, an insurer on its own line, then it would have to show that any loss or damage on its line was not only not due to neg-

12. 34 S. C. R. 526, 233 U. S. 97.

13. N. & W. R. Co. *v.* Wilkinson, 106 Va. 775, 56 S. E. 808.

14. Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 32 S. C. R. 205; Adams Ex. Co. *v.* Croninger, 226 U. S. 491, 33 S. C. R. 148, 47 L. R. A. (N. S.) 257.

ligence, but was provided against by contract, or came within the five common-law exceptions.

The amendment, as thus far construed, afforded to the shipper the needed protection, and the rules of construction announced seemed to be in harmony with the language and intent of the Act.

But " 'Tis the sport to hoist the engineer upon his own petard," and the carriers were soon to show the shipper that this sword, forged as was supposed solely for his protection in an unequal contest with combined corporations, had a double edge, and that what was sauce for the gander was verily tabasco sauce of the *n*th power for the goose! I refer to the construction placed upon the amendment by the Supreme Court with reference to its effect on contracts *limiting the liability of the carrier,* and especially its effect on remedial State legislation passed in the interest of the shipper.

In this country the rule supported by the great weight of authority is, and was, that a common carrier can not contract against his own *negligence.* That is, he could not say that he would not be liable *at all* even in case of negligence. Unless prohibited by statute, as he was in many States,[15] he might by contract limit his liability as an *insurer,* and provide that he should only be liable for his *negligence,* and in such a case he would be liable only for loss or damage occasioned through his *negligence,* but, of course, if a loss resulted through his *negligence,* such a contract would be no defense to him.

A very clear distinction, and an important one, was drawn by the courts between contracts by the carrier for a total exemption, and contracts whereby the carrier sought, not to say "you shall not recover *anything,*" but, "you shall recover *only so much.*" Contracts which sought only to limit the *amount* of recovery were generally sustained. But most important conditions were attached as to the form such a contract should take, and the circumstances under which it was entered into. It was the general rule that, as the carrier might totally absolve himself of *all* liability where he is free from negligence,

15. Code of Virginia, § 1294c (24); C. & O. R. Co. *v.* Pew, 109 Va. 288, 64 S. E. 35; So. Ex. Co. *v.* Keeler, 109 Va. 459, 64 S. E. 38.

he might, of course, by contract *limit* the *amount* of recovery in the event of a loss without negligence. The greater power included the lesser. But, where the limitation was merely on the *amount* of recovery, the courts went further, and under certain conditions which were strictly insisted upon, sustained such contracts even where the goods were lost through *negligence.* This was the general rule, though many States had provided otherwise by statute.[16] The general rule, the leading case announcing which was Hart *v.* Penn. R. Co.,[17] may be succinctly stated as follows:

(1) Where the *value* of the goods was not agreed upon and there was *no reduction in the freight* on account of the limited liability, but simply a bald provision by the carrier in his bill of lading that he would not be responsible in any case beyond a certain sum, the weight of authority was to the effect that the limitation on the *amount* of the recovery was *invalid.*

(2) But, where the value of the goods was *agreed* upon, and, *in consideration of a reduced valuation and of a lower freight rate,* the shipper and the carrier *mutually agree* that the liability of the carrier, even in case of a *negligent loss,* shall be limited to the sum agreed upon, the majority of the courts held that the limitation on the *amount* of the recovery was *valid.*

Such a contract was held not to be a contract against *negligence.* It was said that for the purposes of that shipment the goods were actually only *worth* the agreed sum, and that, being only worth that sum, it made no difference as to the amount of recovery whether the loss occurred through accidental or negligent causes. The shipper could not give a low valuation, obtain a reduced freight rate, and then, when the goods were lost, recover their full value. This doctrine rested almost wholly on the principle of *estoppel.* But, let it be noted, for the rule to apply, in all cases a *clear, special* and *express* contract with the shipper was required. He must be given his *option* to ship at the higher valuation and pay more, and he must know that

16. As in Virginia. So. Ex. Co. *v.* Keeler, supra; Adams Ex. Co. *v.* Green, supra; C. & O. R. Co. *v.* Beasley, Couch & Co., 104 Va. 788, 52 S. E. 566.

17. 5 S. C. R. 151, 112 U. S. 331.

he has such option. Subject to this principle, it was generally held that an express stipulation in the carrier's receipt or bill of lading that the carrier's liability would be limited to a certain amount, if not apprised of the value of the thing to be carried and paid for his risk accordingly, constituted a valid contract of limitation, unless the shipper disclosed and declared the true value and paid the increased freight; that in such a case the carrier did not have to make any inquiry of the shipper. It was the shipper's duty to make the declaration of value. However, it was conceived that the business world knew that all bills of lading contained such stipulations, and that the acceptance of the bill of lading with such terms in it, gave the shipper his *notice* and his *option*. These he *had to have*.

Up to January 6, 1913, the State courts continued to administer the law on the above principles, and continued to give effect to the local statutes which forbade limitations even on the amount of recovery in many States. None of the State courts seem to have been of the opinion that the Carmack amendment did more than by its language it purported to do—made the initial carrier liable for losses on connecting lines—; none seemed to think that it invalidated State statutes as to other matters. But, on the date above mentioned, three decisions were handed down by the Supreme Court of the United States, which, so far as the subject matter of this article was concerned, proved revolutionary, and which declared a uniform rule on the subject applicable throughout the entire United States, State statutes and constitutions to the contrary notwithstanding.

In Adams Express Company *v.* Croninger,[18] the first of these cases, the facts were as follows: A package containing a diamond ring was delivered by the plaintiff to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia. The package was never delivered. The express receipt was in the usual form and provided that the company should not be liable for over $50.00 unless a greater value was declared by the shipper and expressage paid accordingly. No value was declared. The suit was instituted in Kentucky, and under the laws of that State the contract of limitation was invalid. The

18. 226 U. S. 491, 33 S. C. R. 148, 44 L. R. A. (N. S.) 257.

lower court gave judgment in favor of the plaintiff for the full value of the ring, $137.52. The Supreme Court of the United States reversed this judgment and held:

First. The Carmack amendment to the Interstate Commerce Act, while it does not deal directly with the subject of limitations on the *amount* of the recovery, yet evinces the intention of Congress to assume *exclusive control* over all contracts of interstate commerce.

Second. That, this being the case, all *State laws* regulating the subject of the validity of contracts for *interstate shipments* are struck down and rendered null and void.

Third. That, all State laws as to such contracts having been abrogated; this leaves such contracts subject to general rules of law, unaffected by statutes.

Fourth. That by the general and prevailing construction of such general law: (a) The carrier by a fair, open, just, and reasonable agreement, may limit the *amount* of recovery in consideration of a reduced rate for the carriage; and that such agreements are not prohibited by the Carmack amendment; (b) When the bill of lading or receipt contains a provision limiting the *amount* of the recovery unless a greater value is declared by the shipper, it is not the duty of the carrier to inquire as to the value, but it is the duty of the shipper to *disclose it;* (c) By a like agreement, the carrier may limit *any recovery* against itself, by reason of its own acts or those of a connecting carrier, for any losses which do not result from *negligence.*

Fifth. That the saving clause in the Carmack amendment which provides that the shipper shall not be deprived "of any remedy or right of action which he has under existing law" refers to existing *Federal* law and not State law.

In Chicago, etc., R. Co. *v.* Latta,[19] there was an interstate shipment of two horses. By a shipping contract it was agreed that the value of the horses, so far as any recovery against the carrier was concerned, should not exceed $100.00, and freight was paid on this valuation. The shipper was given the option of declaring a higher value and paying more freight. The horses

19. 33 S. C. R. 155, 226 U. S. 519.

were lost in the course of interstate transportation. Suit to recover was brought in Nebraska. By the *Constitution* of that State the contract limiting the amount of recovery was *invalid.* The lower court allowed a recovery for the *full value* of the horses. This judgment was reversed by the Supreme Court of the United States for the reasons announced in the Croninger Case, supra, and the contract limiting the *amount* of recovery was held valid.

So, in Chicago, etc., R. Co. *v.* Miller,[20] there was a similar contract limiting the amount of recovery for a stallion shipped to $100.00. The contract was made in Iowa, under whose laws it was void, and the suit was instituted in Nebraska, the Constitution of the latter State invalidating such contracts. The lower court gave judgment for the full value of the stallion, $2000.00. This judgment was also reversed by the Supreme Court of the United States, for the same reasons assigned in the Croninger Case.

These decisions blazed the trail, and others have since followed amplifying the doctrines therein announced. There might be mentioned Kansas, etc., R. Co. *v.* Carl,[21] upholding a limitation to $50.00 per hundred pounds on household goods, and Missouri, etc., R. Co. *v.* Harriman,[22] applying the above principles to a shipment of live stock. A valid case of "agreed valuation" was also held to be presented when the shipper fills out a printed bill of lading describing the shipment as "emigrant movables, released to $10.00 per cwt." [23] The doctrine was reiterated in Wells, Fargo & Co. *v.* Nieman-Marcus Co.,[24] that the acceptance of an express receipt limiting the amount of recovery binds the shipper. And the case of George N. Pierce Company *v.* Wells, Fargo, & Co.[25] (decided February 23, 1915), gives as extreme an illustration of holding the shipper to the amount named in the receipt or bill of lading as could well be imagined. There a car-

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20. 33 S. C. R. 155, 226 U. S. 513.

21. 33 S. C. R. 391, 227 U. S. 639.

22. 33 S. C. R. 397, 227 U. S. 657.

23. Great Northern R. Co. *v.* O'Connor, 34 S. C. R. 380, 232 U. S. 508.

24. 33 S. C. R. 267, 227 U. S. 469.

25. 35 S. C. R. 351.

load of Pierce-Arrow automobiles was shipped from Buffalo to San Francisco. The carrier delivered to the shipper an express receipt in the ordinary form, containing the familiar stipulation, "Nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated." No other value was stated, the car was destroyed by fire, and the shipper was limited to a recovery of $50.00, though the shipment was worth $15,000.00.

The most surprising feature of these cases consisted in the holding that the Carmack amendment evinced an intention on the part of Congress to assume complete control over all contracts of interstate shipment. The supreme court of no State, so far as I am advised, had so construed the Act. Once granting this *premise,* the conclusions of the court that all State laws were rendered void inevitably followed. Now, although Congress was held to have assumed complete control, yet it had to be admitted that there were no provisions made in the Carmack amendment, or in any other Act of Congress, providing for the specific rules of law which should govern in such cases. The Supreme Court, therefore, adopted as the binding uniform rule, what had been the general law, as administered in the Federal courts theretofore, thus imposing on each State a rule which had never been followed by many of them, and which had been repudiated in many other States by statute. We have already seen something of the havoc wrought with State statutes, and even with State constitutions. Another instance or two may be mentioned.

In Missouri, etc., R. Co. *v.* Harriman,[26] a provision in a bill of lading issued on an interstate shipment that *suit must be brought* within *ninety days* from the date of damage was held to be valid, though such a stipulation was declared void by both a statute of the State where the damage occurred and by one of the State where the suit was brought.

In C. R. I. & P. R. Co. *v.* Cramer,[27] it was held that statutes which like the Iowa statute nullify contracts limiting the liability of a carrier for loss or damage to the agreed or declared value

26. 33 S. C. R. 397, 227 U. S. 657.
27. 34 S. C. R. 383, 232 U. S. 490.

upon which the rate was based, were superseded, so far as interstate shipments are concerned, by the Carmack amendment, which furnishes the exclusive rule on the subject of the liability of a carrier under contracts for interstate shipments. The Iowa statute here struck down provided: "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

In this connection it is of interest to note that the Virginia statute,[28] which strongly resembles the Carmack amendment, provides that "No contract, receipt, rule or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into." In so far as this statute might be construed to apply to interstate shipments, it is, of course, of no effect.

It is well to note of these decisions: First, they apply only to *interstate* shipments; second, the local laws of the States as to *intrastate* shipments are not effected by them; third, even as to *interstate* shipments the carrier can not contract that there shall be no recovery in cases of negligence, although, prior to the very recent Act of Congress hereinafter noticed, by a fair agreement, based on a reduced freight rate, the *amount* of recovery even in case of negligence could be limited; fourth, the provision of the Carmack amendment making the *initial carrier* liable *throughout the transportation for negligent losses* was not affected by the decisions. Such carrier might, under the restrictions named, limit the *amount* of the recovery, but could not contract that there should be *no* recovery at all for a *negligent* loss.

It was also settled that the connecting carriers are entitled to the exemptions contained in the bill of lading issued by the initial carrier.[29]

Having construed the *direct* effect of the Carmack amendment and having then put into operation its supposed *indirect* effect the last phase of construction evolved a doctrine which is sub

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28. § 1294c (24) Code of Virginia.

29. Kansas So. R. Co. *v.* Carl, 33 S. C. R. 391, 227 U. S. 639.

mitted to have been no less surprising in itself than as a repudiation or ignoring of the direct language of the amendment. It will be recalled that the amendment required the carrier on every interstate shipment to *issue* a receipt or bill of lading therefor, and that it further provided that no contract, receipt, rule or *regulation* of the carrier should absolve it from the liability imposed by the amendment. Let us see where the shipper stood up to June 3, 1915. Let us examine the *new rule* whereby it was held that the shipper must take notice of the tariffs filed with the Interstate Commerce Commission.

In Chicago & Alton R. Co. *v.* Kirby [30] the facts and holding were as follows:

Kirby desired to send a car load of horses in time to reach a special sale at Madison Square Garden. The railroad contracted to carry them in time to make connection with a certain fast train on a connecting line. This it failed to do; the horses reached New York forty-eight hours late, and Kirby sustained damage to the amount of several thousand dollars and sued the defendant for such damages. The defendant had no published tariff rate for such special service as it had contracted for, and Kirby paid simply the regular rate for ordinary service. The shipment was an interstate one.

Held: The contract made was a violation of the Interstate Commerce Act in that it constituted an undue and unreasonable preference under such act. By such contract Kirby was entitled to an expedited service though he only paid the usual rate, and he would have been entitled to an action against the carrier for a delay even though not caused by negligence, whereas other shippers paying the same rate, but without the benefit of such special contract, could only have recovered in case of a negligent delay. In order for such a contract as the above to be binding, the railroad must have duly published a regular special tariff for such special services. If it either has no such special tariff and carries at regular rates, or—having no special tariff—agrees to an increased rate, in both cases the contract would be void; in the latter case because it can only carry according to regular, uniform published tariffs and not according to sporadic or spe-

30. 225 U. S. 155, 32 S. C. R. 648.

cial contract rates. The fact that Kirby did not know that there was no special tariff for his contract made no difference. He is conclusively presumed to have known.

In this, and several other cases, the doctrine was announced that the *shipper* must *take notice* of the published tariffs at his peril. One feature of this holding of local interest was that the Supreme Court of Appeals of Virginia, in C. & O. R. Co. *v.* Ruckman, delivered an elaborate opinion upholding such a contract, and this opinion came out in the advance sheets of the South Eastern Reporter. Upon an application for a rehearing, the Kirby case was called to their attention, whereupon they withdrew their former opinion, and reversed the lower court in a short per curiam note.[31]

But this Kirby case created no great surprise. It was a *rate* case, and everyone recognized that *discriminations* would not be tolerated. As said by Mr. Justice Pitney in his dissenting opinion in another case hereafter to be noted:[32] "The distinction between a ground of action based upon the breach of such a *special contract* and one based upon the carrier's liability for *negligence* was clearly recognized in the opinion." And the same distinction is adverted to in an editorial in the *Harvard Law Review* for June, 1914.[33]

But this doctrine of *notice to the shipper* by the mere filing of tariff rates was at last pushed to the very verge of reason, and under circumstances where no question of discrimination was in reality involved.

In Boston & Maine R. Co. *v.* Hooker[34] (decided April 6, 1914) a doctrine was announced which seemed to be rather disastrous to shippers and passengers. Mrs. Hooker checked two trunks and a suit case on her first class ticket. The appearance of the baggage was such as to indicate that it was quite valuable, there were no limitations in the ticket nor in the baggage checks as to the amount of recovery. She was asked no questions and volunteered no information. The carrier had filed with the Inter-

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31. 115 Va. 493, 80 S. E. 496.

32. Boston & Maine R. Co. *v.* Hooker, 34 S. C. R. 526, 233 U. S. 97.

33. 27 Harvard Law Review, page 738.

34. 34 S. C. R. 526, 233 U. S. 97

state Commerce Commission its rate sheets and regulations and these contained a clause limiting liability to $100.00, unless a greater valuation was declared, etc.

The court held that the mere filing of these rate sheets with the Interstate Commerce Commission was notice to all passengers; that the $100.00 limitation automatically attached when the trunks were checked and no valuation was declared; and that this was true although Mrs. Hooker knew absolutely nothing of the limitation, same was not brought to her attention by her ticket nor the baggage checks, she was given no specific option to pay a higher rate, and the loss was conceded to have been caused by the *negligence* of the carrier. The judgment of the Supreme Court of Massachusetts for $2253.77, the full value of the baggage, was reversed.

The reasoning in this case would seem to apply equally to freight shipments [35] and its importance to shippers and passengers was tremendous, as it practically charged everybody with notice of the rate sheets and held them to have contracted with reference thereto, independent of estoppel, and whether they knew anything about the limitation or not.

From this holding Mr. Justice Pitney dissented in a powerful opinion, a few extracts from which will be quoted. He says:

> "I have been unable to find a previous instance where any court, in this country, at least, in an action by shipper or passenger against common carrier for loss of freight or baggage, occasioned by the negligence of the carrier or its employees, has held the recovery to be limited to an arbitrary sum unrelated to the value of the goods lost, and this without any previous valuation or agreement assented to by the shipper or passenger, without any representation of value made by him, and without even notice brought home to him of any rule or regulation upon which the limitation of liability is based. The effect given by the present decision to a 'regulation' prescribed by the carrier, that, while formally promulgated, was in fact unknown to the passenger, seems to me an entire departure from the principles governing the duties and responsibilities of common carriers as heretofore recognized by this court and by the courts of the States gen-

35. And the doctrine has been so applied. Atchison, etc., R. Co. *v.* Robinson, 34 S. C. R. 556, 233 U. S. 173.

erally, as laid down in the text-books and cyclopædias of law, and as reiterated and applied by this court in a recent series of notable decisions."

The learned dissenting justice refers to the decision in the Hart case,[36] that limitations on the amount of recovery have always been recognized solely on the ground of *estoppel,* and on the theory that there was a fair open contract and an *option* offered and known to the shipper. He shows that the Supreme Court itself, in the case of Penn R. Co. *v.* Hughes,[37] directly held that the mere filing of tariffs did not amount to a *regulation* of the subject of limitation contracts between the carrier and the shipper, and that a State might enforce its own regulations on the subject. In the writer's opinion, he got at the very heart of the matter when he said that these tariff sheets and regulations as to baggage or freight were not in themselves *contracts,* that they were mere *formulæ* for *standardizing* the contracts proposed to be made by the carrier with the assent of the passenger or shipper, that the formula of itself did not constitute a substitute for a contract, and was not intended to become binding upon the passenger or shipper until directly brought to his notice and in some way consciously assented to by him. In conclusion, he says:

"I submit that the Hepburn Act, like the original act and its other amendments, is intended to impose duties upon the carrier—the public servant—not upon the shipper or passenger. There is nothing in the letter or the policy of the acts to absolve the carrier from its long recognized duty to treat all shippers and passengers fairly, and to give them an actual opportunity to make a choice, where a choice is legally open to them. A carrier may not absolve himself in whole or in part from his responsibilities by any ex parte action. And where the rates, schedules and accompanying regulations are designed to give an option to the shipper, it is, I submit, incumbent upon the carrier to see that the option is in good faith tendered, or else abide by the more onerous of the alternatives. The Carmack amendment means this, at least, if it means nothing more. Therefore, the failure to deliver a bill of lading evincing the limitation of liability should

36. 5 S. C. R. 151, 112 U. S. 331.
37. 24 S. C. R. 132, 191 U. S. 477.

impose upon the carrier the highest responsibility, not the least, that the regulations admit of; that is to say, an unlimited responsibility for the goods.

"The serious consequences of the present decision are sufficiently manifest. Heretofore, shippers and passengers have been entitled to rest in the assurance that a common carrier who accepted their goods for transportation in the ordinary course of a carrier's public employment became responsible, without any express contract upon the subject, for the full value of the goods, in case of their destruction through any negligence of the carrier or its agents, unless there was a distinct understanding to the contrary, participated in by the shipper or passenger. Hereafter, so far as interstate shipments by rail are concerned, the traveler or shipper can not rest upon any such assurance, and will not be safe in dealing with a railroad company without being authoritatively instructed respecting the latest regulations filed by the carrier with the Interstate Commerce Commission at Washington. He can not rely upon finding the regulations posted in the railroad station, for this is not essential to the efficacy of the schedules.[38] He can not rely upon public notices that may be in fact posted in the station, for these may be misleading, as they were in the present case. He can not rely upon receiving information from the company's local agents, for this may be withheld, as it was in this case. Unless he is possessed of a copy of the tariff schedules as filed, with time enough to scrutinize them, and skill enough to comprehend them, he must, perforce, accept whatever terms the railroad company may see fit to offer, and may not hope to be furnished with even a scrap of paper to indicate what those terms are. I can find no support for the result thus reached, either in the statute or in any previous decision."

However, these views, so forcibly expressed, had no effect on the court's holdings, as is shown by the subsequent cases of Atchison, etc., R. Co. *v.* Robinson,[39] and George N. Pierce Co. *v.* Wells, Fargo & Company,[40] in both of which the holding in the Hooker case was emphasized and adhered to.

It is believed that the holding in the Hooker case created great surprise all over the country. In an editorial in the *Har-*

38. Citing Texas & P. R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. C. R. 358.

39. 34 S. C. R. 556, 233 U. S. 173.

40. 35 S. C. R. 351.

vard Law Review for June, 1914,[41] it is said of this decision: "Since legally the only type of service is one with unlimited liability unless an affirmative agreement or statement of valuation is made by the shipper, he can not be said to have requested or in fact to be entitled to the limited service without the creation through constructive notice of a fictitious affirmative act on his part. Such a result is a wholly unnecessary, radical and unjust extension of the doctrine. If followed out logically, it would allow railroads to make use of a strategically advantageous position to overreach their patrons. For instance, they might discard their present lengthy bills of lading, issue simple receipts, and still bind the shipper without his knowledge by the mere filing of regulations with the Commission."

But, whatever we may think of it, such was held to be the law, and the shipper had to govern himself accordingly.

Let us look for a moment at what the shipper received from the Carmack amendment, this child of his hope from which he expected so much.

The only *benefit* that he retained was that the first carrier was liable for the *negligence* of its successors, and could not contract against this. It is *possible* that he lost his right to hold the first carrier to its common law responsibility, even in the absence of contract. It is *certain* that he lost all that the State legislatures had given him in the way of remedial legislation. Around this youthful act, fortified with the *gripping* power given it by construction, dead statutes lay like strangled snakes around the infant Hercules! And, by the process of ignoring its mandate, he no longer necessarily had the comfort of even seeing the contracts which the railroad offered him, but, at his peril, had to carry in his mind all of the details of those fearsome and wonderful schedules and tariffs which have their home in the archives of the Interstate Commerce Commission in Washington. Verily, the last state of the shipper was worse than his first!

The writer fears that his interest in this subject has already led him to extend this article to too great length, and that, even if it has in some parts been of interest to its readers, their most flattering comment would be on a par with that of the old coun-

41. 27 Harvard Law Review, page 738.

tryman who said to the Hon. John Randolph Tucker, after the latter had concluded a long and vigorous speech on a hot day, "Ran, it was a powerful speech, a powerful speech, but *mighty te jus!*"

But this article would be altogether incomplete without some notice of the very recent and very important Act of Congress known as the "Cummins' Act," passed by Congress on March 4, 1915, and which went into effect on June 3, 1915. This Act is an amendment of the Carmack amendment, and its aim is, doubtless, to give to the shipper the relief which the former amendment had failed to secure him. Its provisions are as follows (the parts in italics are *new*):

"Any carrier, railroad, or transportation company *subject to the provisions of this Act* receiving property for transportation from a point in one State *or Territory or the District of Columbia* to a point in another State, *Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country* shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass *within the United States or within an adjacent foreign country when transported on a through bill of lading,* and no contract, receipt, rule, regulation, *or other limitation of any character whatsoever,* shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Teritory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lad-*

ing, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*

"This Act shall take effect and be in force from ninety days after its passage." [42]

In view of the surprises which attended the construction of the original Carmack amendment, it would require more hardihood and temerity than the writer possesses to attempt to say with confidence just what the effect of this last mentioned amendment is. It makes great changes in the original law, and was doubtless primarily designed to change those rules as to the validity of contracts limiting the *amount* of recovery, and as to *tariff* sheets being *notice*, which had been announced by the Supreme Court in construing the Carmack amendment.

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42. U. S. Compiled Laws § 8592, clauses 11, 11a. Published in a supplement to the Federal Reporter Advance Sheets for April 29, 1915, 220 Fed. No. 4.

It would *seem* that some of the results of this Act are as follows:

(1) The provisions of the original act are extended to cover not only shipments from State to State, but also shipments to and from the Territories and the District of Columbia, and to an adjacent foreign country, although in the last case only where transported on a through bill of lading.

(2) Limitations on the *amount* of recovery are declared to be unlawful and void. The carrier is liable for the full actual loss, damage, or injury. There seems to be one exception to this rule. "If the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper." It would seem that if the carrier could either ascertain the character of the goods by observation, or if the shipper notified him as to their character, in neither case is any declaration of value required, and in neither case does the proportionate rate provision apply.

(3) A rule is prescribed as to the length of time which *must* be given the shipper to protect his rights. He must have for giving notice of his claim ninety days; for filing his claim four months, and for bringing his suit two years. And if the loss, etc., was due to delay or damage in loading or unloading, or was due to *carelessness* or *negligence,* then the shipper neither has to give notice of nor file a claim.

(4) There is at least a plausible argument that this act makes the initial carrier an *insurer,* makes it liable for *all* loss, damage, or injury whether due to negligence or not, and whether occurring on its own or on a connecting line. As opposing this view it may be said that the new act still says the initial carrier shall be liable for losses, etc., "caused" by it or by subsequent carriers, and that this word "caused" in the original Carmack amendment was held to mean *negligent* losses *only.* But the new act also

provides that the first carrier shall be liable "for the full actual loss, damage, or injury," and "notwithstanding any limitation of *liability*" in the bill of lading, etc. Both the phrases "limitation of *liability*" and "limitation of the *amount* of recovery" are used, so Congress would seem to have had in mind the distinction suggested by the language used. Besides this, limitations against *any liability* for *negligent* losses were not allowed by the general law, even independent of the act; so if the provision were held to apply only to *negligent* losses it would be useless. And, lastly, it is provided that for losses, etc., due to *negligence* no notice of claim or filing of claim shall be necessary, though in other cases it may be. If the new act only made the carrier liable for *negligent* losses, why provide as to the time for notice where the loss was *not* due to negligence? This question will doubtless be raised.

It is also to be noticed that the new act omits the provision in the original Carmack amendment whereby a recovery over is given to the first carrier against the carrier actually in fault. Probably it was thought that this right existed without the aid of legislation.

We have seen that the original act was held to apply to *baggage*, and the writer is informed that the Interstate Commerce Commission has ruled that the new act also applies to baggage, and that it comes within the provision as to goods "hidden from view," as to which the passenger or shipper must declare the value. The result would seem to be that hereafter every time a man buys a ticket to a point out of the State and checks his trunk he will have to make a declaration of its value. A dishonest declaration will constitute a misdemeanor.[43]

That this act will require much construction is obvious. But if it leads to a settlement of the law of interstate shipments on a basis more equitable and reasonable than that resulting from the doctrine of the Hooker case, we can afford to bear the effect of the present unsettled conditions in view of the future benefits.

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43. Paragraph 3 of § 10 of the Interstate Commerce Act, as amended June 18, 1910.